U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: SEP 19 2013 Office: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. According to Part 6 of the Form I-140, the petitioner seeks employment as a "Special Education Teacher" for . The petitioner worked at in New Carrollton, Maryland from 2007 – 2011. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by

increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990, published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

In re New York State Dept. of Transportation (*NYSDOT*), 22 I&N Dec. 215, 217-18 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner must establish that the alien will serve the national interest to a substantially greater degree than would an available United States worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The intention behind the term "prospective" is to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The USCIS regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner has established that his work as a special educator is in an area of substantial intrinsic merit. It remains, then, to determine whether the proposed benefits of the petitioner's work would be national in scope and whether he will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. Assertions regarding the overall importance of an alien's area of expertise cannot suffice to establish eligibility for a national interest waiver. *NYSDOT* at 220. Moreover, it cannot suffice to state that the alien possesses useful skills, or a "unique background." Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *Id.* at 221.

The petitioner filed the Form I-140 petition on January 25, 2012. In a January 24, 2012 letter accompanying the petition, counsel stated that the petitioner's national interest waiver is based on his equivalent Master's degree in special education, "the numerous recognitions received by him," and his "combined teaching experience of over six (6) years." Academic degrees, experience, and recognition such as awards are elements that can contribute toward a finding of exceptional ability. *See* 8 C.F.R. § 204.5(k)(3)(ii)(A), (B), and (F), respectively. Exceptional ability, in turn, is not self-evident grounds for the waiver. *See* section 203(b)(2)(A) of the Act. The petitioner's recognition and work as a special educator will be further discussed later in this decision.

The petitioner submitted a January 19, 2012 letter discussing his education, teaching background, personal qualities, and job responsibilities. In his letter, the petitioner did not mention the *NYSDOT* guidelines or explain how he meets them. In addition, the petitioner did not indicate that his work as a teacher has had an impact beyond the schools where he has taught. With regard to the petitioner's special education work for there is no evidence establishing that the benefits of his work would extend beyond the school system such that they might have a national impact. *NYSDOT*, 22 I&N Dec. at 217, n.3. provides examples of employment where the benefits would not be national in scope:

> For instance, pro bono legal services as a whole serve the national interest, but the impact of an individual attorney working pro bono would be so attenuated at the national level as to be negligible. Similarly, while education is in the national interest, the impact of a single schoolteacher in one elementary school would not be in the national interest for purposes of waiving the job offer requirement of section 203(b)(2)(B) of the Act. As another example, while nutrition has obvious intrinsic value, the work of one cook in one restaurant could not be considered sufficiently in the national interest for purposes of this provision of the Act.

In the present matter, the benefits of the petitioner's impact as a special educator would be limited to students at his school and, therefore, so attenuated at the national level as to be negligible. In addition, the record lacks specific examples of how the petitioner's work as a special education teacher has influenced the education field on a national level. At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification he seeks. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6.

The petitioner submitted various letters of support from administrators, teachers, and parents discussing his work as a special educator. The petitioner also submitted letters commenting on his graduate studies in the College of Education at the and his practice teaching assignment at As some of the letters contain redundant claims already addressed in other letters, not every letter will be quoted. Instead, only selected examples will be discussed to illustrate the nature of the references' claims.

, Principal, stated:

> I have been acquainted with [the petitioner] for about 5 years as his Principal and Supervisor at in [The petitioner] taught students with special needs in our school. He was a valuable part of our Instructional Team working with children with Autism and multiple-handicapping conditions.
>
> * * *
>
> He conducted regular formal and informal assessments in order to move his students towards achievement through effective programming.
>
> Since his assignment here at [the petitioner] demonstrated leadership by working as the Alternate Maryland State Assessment Coordinator. As Coordinator [the petitioner] developed and implemented grade level testing artifacts aligned with the Maryland State Curriculum that are appropriate for children with disabilities. He worked effectively with colleagues and assisted our students in achieving mastery in both IEP [Individualized Education Program] goals and ALT-MSA [Maryland School Assessment] mastery objectives.

comments on the petitioner's responsibilities at but she does not indicate that the petitioner's work has had, or will continue to have, an impact beyond the students under his tutelage and the local school system that employed him.

, Professional School Counselor, , stated:

> [The petitioner] has been a teacher here at since August of 2007. . . . [The petitioner] worked for his first three years with children whose ages make them approximately tenth and eleventh graders. His students all had a disability code of intellectual disability. Most that he worked with were also autistic. [The petitioner] provided the structure, routine and accommodations that each child in his class required. . . . He provided vocational training that would be invaluable for our students when they graduated and move on to adult programs.
>
> During the 2010/2011 academic year, [the petitioner] worked with much younger students. These students were in approximately grades three and four. They were also primarily

autistic and nonverbal. [The petitioner] brought wonderful assistive technology to his classroom! The students worked with a Smart Board and software to aid them in writing and word recognition. . . . [The petitioner] provided the structure and challenges these students needed to make progress.

comments on the petitioner's activities as a special education teacher at , but does not indicate how the petitioner's impact or influence as a special educator is national in scope.

, Special Education Chair, , stated:

I have known [the petitioner] for four years here in . . . . During his tenure at I have observed [the petitioner] having a positive influence on the students with severe and profound disabilities. [The petitioner] served as Alt Msa coordinator for two years at . During his time as coordinator, our students showed a marked influence in all areas (reading, math, and science). This data was taken from overall student scores.

[The petitioner] also worked with students in the vocational area. He was able to design job plans for these students that included the necessary supports to cause them to be hired or to be placed in appropriate vocational skills programs upon their graduation.

discusses the petitioner's work as an educator and Alt-MSA coordinator at , but fails to provide specific examples of how the petitioner's work has influenced the field as a whole.

, a parent whose child attended stated:

[The petitioner] has contributed a significant progress in my son's development. His expertise and result-oriented approach in teaching brought about learning of functional skills that I am very happy to see in my son.

* * *

As a parent, I am proud to say that [the petitioner] did an excellent job in taking care of my son at school, especially on days when he is not in a good mood. He understands that the [sic] Aaron had special needs that he knows how to address appropriately. He made his class periods interesting and engaging for his students.

comments on the petitioner's effectiveness as a teacher, but observations do not set the petitioner apart from other competent and qualified teachers, or explain how the petitioner's work has impacted the field beyond his students at .

, Retired Professor of Curriculum Studies, College of Education, , stated:

> [The petitioner] was my student in two courses in the graduate program at the College of Education, : Strategies to Develop Critical and Creative Thinking and Principles of Elementary and Secondary Education, where he both got high marks, as can be seen in his transcript of records.

comments on training courses taken by the petitioner, but any objective qualifications which are necessary for the performance of the occupation can be articulated in an application for alien labor certification. *NYSDOT* at 220-221. As previously discussed, special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *Id.* at 221. Moreover, academic performance, measured by such criteria as grade point average, is not a specific prior achievement that establishes the alien's ability to benefit the national interest. *Id.* at 219, n.6.

, Master Teacher II, , Philippines, stated:

> [The petitioner] has demonstrated proficiency in remediating a class of non-readers, now all classified as readers. He was able to manage very satisfactorily this last section of 40 students with behavioral problems, who are now all promoted to the next grade level. He has extended valuable assistance to the class adviser in equipping the students with competencies in Reading and Mathematics.
>
> [The petitioner] performed his practice teaching here at , a public school, as a requirement for his Practicum in the Teaching of Exceptional Children. He started this teaching from August 2005 until this February 2006. He was assigned in Section 10, Grade 3. He handled this class of students who are non-readers with learning disabilities and behavioral problems.

comments on the petitioner's practice teaching assignment at and his effectiveness as an educator, but does not explain how the petitioner's work has influenced the field as a whole.

The petitioner's references praise the petitioner's teaching abilities and personal character, but they did not demonstrate that the petitioner's work has had an impact or influence outside of the schools where he has worked. They did not address the *NYSDOT* guidelines which, as published precedent, are binding on all USCIS employees. *See* 8 C.F.R. § 103.3(c). That decision cited school teachers as an example of a profession in a field with overall national importance (education), but in which individual workers generally do not produce benefits that are national in scope. *NYSDOT* at 217 n.3.

The Board of Immigration Appeals (BIA) has held that testimony should not be disregarded simply because it is "self-serving." *See, e.g., Matter of S-A-*, 22 I&N Dec. 1328, 1332 (BIA 2000) (citing cases). The BIA also held, however: "We not only encourage, but require the introduction of corroborative testimonial and documentary evidence, where available." *Id.* If testimonial evidence lacks specificity, detail, or credibility, there is a greater need for the petitioner to submit corroborative evidence. *Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998).

The opinions of the petitioner's references are not without weight and have been considered above. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters of support from the petitioner's personal contacts is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795-796; *see also Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact").

The petitioner submitted the following:

1. A Certificate of Recognition from the [redacted] in honor of the petitioner's "participation in the Challenge Day at [redacted]";
2. Academic transcripts;
3. A Maryland Educator Certificate;
4. A February 21, 2006 "Certification of Good Standing" from the Republic of the Philippines Professional Regulation Commission, Manila;
5. Praxis Series test score reports for the petitioner;
6. A Professional Teacher certificate from the Republic of the Philippines;
7. Employment verifications;
8. Confirmation of the petitioner's Maryland State Education Association membership;
9. Verification of the petitioner's [redacted] Educator's Association membership; and
10. A Certificate of Membership for the Maryland Chapter of the Association of Filipino Teachers of America.

Academic records, experience, professional certifications, membership in professional associations, and recognition for achievements are all elements that can contribute toward a finding of exceptional ability. *See* 8 C.F.R. § 204.5(k)(3)(ii)(A), (B), (C), (E), and (F), respectively. As noted previously, exceptional ability in the sciences, the arts or business is not sufficient to warrant the national interest waiver. The plain language of section 203(b)(2)(A) of the Act indicates that aliens of exceptional ability are subject to the job offer requirement (including alien employment certification). Particularly significant awards may serve as evidence of the petitioner's impact and influence on his field, but the petitioner has failed to demonstrate that the award he received (item 1) has more than local or institutional significance. There is no documentary evidence showing that

items 1 – 10 are indicative of the petitioner's influence on the field of special education at the national level.

The petitioner submitted copies of his "satisfactory" teacher evaluations from . In addition, the petitioner submitted data regarding performance targets and Alt-MSA test results for students at . The petitioner, however, did not submit documentary evidence indicating that he has impacted the field to a substantially greater degree than other similary qualified special education teachers. Moreover, there is no evidence showing that the petitioner's specific work has had significant impact outside of the schools where he has taught.

The petitioner submitted certificates of participation, completion, and attendance for training courses, seminars, and workshops relating to his professional development. While taking courses and attending seminars and workshops are ways to increase one's professional knowledge and to improve as a teacher, there is nothing inherent in these activities to establish eligibility for the national interest waiver.

The director issued a request for evidence, instructing the petitioner to submit evidence to establish that the benefits of his proposed employment would be national in scope and that his "accomplishments are substantially greater than others working in the field of special education." In addition, the director noted that the letters of support submitted by the petitioner failed to demonstrate that petitioner "has influenced the field of special education on a national basis."

In response, the petitioner submitted information about the No Child Left Behind Act (NCLBA) printed from the online encyclopedia *Wikipedia*; President George H.W. Bush's "Remarks on Signing the Immigration Act of 1990"; information about Public Law 94-142; a copy the Supreme Court decision in *Brown v. Board of Education*, 347 U.S. 483 (1954); information about NCLBA grant distribution formulas posted at http://febp.newamerica.net, a statement by U.S. Secretary of Education Arne Duncan on the National Assessment of Educational Progress Reading and Math 2011 Results; a report entitled "Special Education Teacher Retention and Attrition: A Critical Analysis of the Literature"; and a report entitled "SPeNSE: Study of Personnel Needs In Special Education." As previously discussed, general arguments or information regarding the importance of a given field of endeavor, or the urgency of an issue facing the United States, cannot by themselves establish that an individual alien benefits the national interest by virtue of engaging in the field. *NYSDOT*, 22 I&N Dec. at 217. While such arguments and information address the "substantial intrinsic merit" prong of *NYSDOT*'s national interest test, none of the preceding documents demonstrate that the petitioner's specific work as a special educator has influenced the field as a whole.

The petitioner also submitted a July 10, 2012 letter from discussing the petitioner's work as the Alt-MSA Coordinator for . stated:

> As Alt-MSA coordinator, [the petitioner] developed and implemented grade level testing artifacts aligned with the Maryland State Curriculum and Federal Regulations. [The

petitioner] was able to utilize various technology applications in order to develop adapted assessments with appropriate visual supports. He worked effectively with colleagues and assisted our students in achieving mastery in both IEP goals and Alt-MSA mastery objectives. Maryland State Department of Education (aligned with federal law) the roles [sic] and responsibilities of the Alt-MSA School Test Coordinator. [The petitioner] has successfully accomplished these tasks.

[The petitioner] will continue to work as a representative to MSDE [Maryland State Department of Education] for alternate assessments for our county. Regular MSDE meetings will be held with the state wide committee members, with information from federal regulations being share [sic] and developed. This group will participate in decisions in developing state wide assessment procedures, which could extend to national level.

asserts that the petitioner's MSDE meeting group "will participate in decisions in developing state wide assessment procedures, which could extend to national level." comments on what could one day result from the petitioner's involvement with the MSDE meeting group rather than providing specific examples of how his past work has already influenced the field as a whole. Eligibility must be established at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). A petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Izummi,* 22 I&N Dec. 169, 175 (Comm'r 1998). That decision further provides, citing *Matter of Bardouille,* 18 I&N Dec. 114 (BIA 1981), that USCIS cannot "consider facts that come into being only subsequent to the filing of a petition." *Id.* at 176. There is no documentary evidence showing that any procedures or methodologies originated by the petitioner have already been implemented outside of Maryland, or that his work has otherwise influenced the special education field as a whole.

In a July 17, 2012 letter, counsel stated:

Since a 'National Special Education Teacher' is not even a real concept but more of metaphysical cognition [sic], undersigned wishes to once again posit a realistic proposition upon which to establish that the self-petitioner's contributions will impart national-level benefits.

Even authors of books, treatises and other academic materials on Special Education are not in any standing [sic] to claim that their contributions are national in scope since not all special education teachers can be said to utilize their works.

Further, the curriculums used by each state education department in the United States vary from each other.

In other words, since not all NIW cases are based on prevailing Acts of United States Congress, it is but harmless to assert that if an NIW Petition is made with premise on some prevailing Acts of United States Congress, that by itself renders the proposed employment

> national in scope. But in those cases that are not premised on any prevailing Act of United States Congress, NIW self-petitioners must meet the issue on other bases.

The director did not state that the petitioner had to show that he is "a 'National Special Education Teacher,'" or that "all special education teachers . . . utilize [his] works." National scope is not the same as universal reliance on the petitioner's work. Moreover, all employment-based immigrant classifications are based on "prevailing Acts of United States Congress," and so is the statutory job offer requirement. There is no basis to conclude that Congress, by mentioning a given occupation in a particular piece of legislation, exempted aliens in that occupation from the job offer requirement.

Counsel quoted remarks made by then-President George H.W. Bush when he signed the Immigration Act of 1990, which created the national interest waiver: "This bill provides for vital increases for entry on the basis of skills, infusing the ranks of our scientists and engineers and educators with new blood and new ideas." Counsel interprets this passage to mean that Congress created the national interest waiver for educators. The Immigration Act of 1990, however, was not restricted to the creation of the waiver. It was, rather, an overhaul of the entire immigration structure, creating new employment-based immigrant classifications to replace the "third preference" and "sixth preference" classifications previously in place. "[S]cientists and engineers and educators" are all members of the professions who, under the terms dictated by Congress in the Immigration Act of 1990 (as it amended the Act), are all subject to the job offer requirement.

Counsel stated that the labor certification requirement is deficient because, for labor certification purposes, the U.S. Department of Labor considers a bachelor's degree, rather than a master's degree and experience, to be the minimum educational requirement for a special education teacher. The petitioner submitted information from the *Occupational Outlook Handbook* describing what the U.S. Department of Labor considers to be the minimum qualifications necessary to become a special education teacher:

> Public school teachers are required to have a least a bachelor's degree and a state-issued certification or license.
>
> * * *
>
> Education
>
> All states require public special education teachers to have at least a bachelor's degree. Some of these teachers major in elementary education or a content area, such as math or chemistry, and minor in special education. Others get a degree specifically in special education.
>
> * * *
>
> Some states require special education teachers to earn a master's degree in special education after earning their teaching certification.

* * *

Licenses

All states require teachers in public schools to be licensed. A license is frequently referred to as a certification.

* * *

Requirements for certification vary by state. However, all states require at least a bachelor's degree. They also require completing a teacher preparation program and supervised experience in teaching, which is typically gained through student teaching. Some states require a minimum grade point average.

Many states offer general special education licenses that allow teachers to work with students across a variety of disability categories. Others license different specialties within special education.

Teachers are often required to complete annual professional development classes to keep their license. Most states require teachers to pass a background check. Some states require teachers to complete a master's degree after receiving their certification.

Some states allow special education teachers to transfer their licenses from another state. However, some states require even an experienced teacher to pass their own licensing requirements.

All states offer an alternative route to certification for people who already have a bachelor's degree but lack the education courses required for certification. Some alternative certification programs allow candidates to begin teaching immediately, under the close supervision of an experienced teacher.

In addition, counsel stated:

> The truth of the matter however, is that the employer is required by No Child Left Behind (NCLB) Law and all other pronouncements by both the Federal and State Governments to employ highly qualified teachers and would in all actualities require to continue the professional services of the likes of [the petitioner] to achieve no less than the best interest of the American students.

Section 9101(23) of the NCLBA defines the term "Highly Qualified Teacher." Briefly, by the statutory definition, a "Highly Qualified" elementary school teacher:

- has obtained full State certification as a teacher or passed the State teacher licensing examination, and holds a license to teach in such State;
- holds at least a bachelor's degree; and
- has demonstrated, by passing a rigorous State test, subject knowledge and teaching skills in reading, writing, mathematics, and other areas of the basic elementary school curriculum, or (in the case of experienced teachers not "new to the profession") demonstrates competence in all the academic subjects in which the teacher teaches based on a high objective uniform State standard of evaluation.

Section 9101(23)(A)(ii) of the NCLBA further indicates that a teacher is not "Highly Qualified" if he or she has "had certification or licensure requirements waived on an emergency, temporary, or provisional basis."

Counsel contends that the labor certification process "would not meet the objective of the employer to hire highly qualified teachers pursuant to No Child Left Behind" because the labor certification process requires only a bachelor's degree. Section 1114(b)(1)(C) of the NCLBA, 20 U.S.C. § 6314(b)(1)(C), dictates that "[a] schoolwide program shall include . . . [i]nstruction by highly qualified teachers." The regulation at 34 C.F.R. § 200.56 defines the term "highly qualified teacher," and the regulation at 34 C.F.R. § 300.18 lists supplementary requirements for "highly qualified special education teachers." The petitioner has not established that the "Highly Qualified" standard involves requirements that are significantly more stringent than those outlined in the *Occupational Outlook Handbook*, or that a public school could not obtain a labor certification for a "Highly Qualified Teacher." Thus, the petitioner's level of education and experience are not required for "highly qualified" status under the NCLBA. Counsel, therefore, did not support the claim that the labor certification process frustrates the NCLBA's mandate for schools to employ "highly qualified teachers."

In addition, counsel did not discuss the regulations at 34 C.F.R. § 200.56 and § 300.18 or Maryland's state-specific requirements, or cite any evidence to show that the labor certification process does not permit the hiring of "highly qualified teachers." If, by law, a teacher must be "highly qualified," then a teacher who does not meet the applicable requirements is not "minimally qualified." Rather, that teacher is underqualified or unqualified. Counsel has not shown that the labor certification process has forced or any other Maryland jurisdiction to hire teachers who do not meet the requirements of "highly qualified teachers." Rather, because "highly qualified" is statutory standard for such teachers, that term appears to be functionally equivalent to the term "minimally qualified" for purposes of labor certification.

Counsel referenced to various statutes, policy initiatives, and *Brown v. Board of Education*, 347 U.S. 483 (1954), all of which affirmed the value of education, but none of which exempted teachers from the job offer requirement at section 203(b)(2)(A) of the Act. The undeniable importance of education is not sufficient to establish the petitioner's eligibility for a national interest waiver. *See NYSDOT* at 220. Moreover, none of the provisions mentioned by counsel specifically established a blanket waiver for foreign special education teachers.

Following the issuance of *NYSDOT* in 1998, Congress has enacted only one statutory change in direct response to that precedent decision. Specifically, Congress added section 203(b)(2)(B)(ii) to the Act, creating special waiver provisions for certain physicians. Those provisions do not apply in this proceeding. Therefore, *NYSDOT* provides the controlling guidance in the present matter. Counsel did not show that the other statutory provisions he cited indirectly imply the petitioner's eligibility for the waiver, even though those provisions never mention the waiver directly.

Counsel stated that "unquantifiable factors that zero in on 'passion'" distinguish the petitioner from qualified United States workers and that labor certification cannot take these factors into account, but the record contains no evidence to support the claims. The unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel cited a study showing that special education teachers "shift careers" and move to general education, and therefore "[t]he protection afforded for U.S. workers enshrined in the labor certification process will not in any way be jeopardized by grant of waiver in favor of" the petitioner. In addition, counsel cited another study indicating the percentages of special educators who are fully certified who hold master's degrees. The classification sought, however, was not designed merely to alleviate skill shortages in a given field. In fact, that issue properly falls under the jurisdiction of the Department of Labor through the alien employment certification process. *NYSDOT* at 221. The statutory standard is that the waiver will serve the national interest, and counsel's observations do not address that standard.

Counsel stated that another [redacted] teacher received a national interest waiver, and asked that the present petition "be treated in the same light." Each petition filing is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, USCIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). While AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished service center decisions are not similarly binding. *See* 8 C.F.R. § 103.3(c). Furthermore, counsel provided no evidence to establish that the facts of the instant petition are similar to those in the unpublished decision. Without such evidence, the assertion that both cases merit the same outcome is unwarranted. The only stated similarity is that the beneficiary of the approved petition is "also a teacher in [redacted]."

The director denied the petition on January 24, 2013. The director found that the petitioner failed to establish that an exemption from the requirement of a job offer would be in the national interest of the United States. The director's decision stated: "It is not sufficient to establish that one school or one school district will benefit from a beneficiary's actions."

On appeal, counsel asserts that "USCIS erred in giving insufficient weight to the national educational interests enunciated in the No Child Left Behind Act of 2001 as the guiding principle

rather than the precedent case" *NYSDOT*. Counsel, however, does not point to any specific legislative or regulatory provisions in the NCLBA that exempt foreign school teachers from *NYSDOT* or reduce its impact on them. It is within Congress's power to establish a blanket waiver for teachers, "highly qualified" or otherwise, but contrary to counsel's assertions, that waiver does not yet exist. With regard to following the guidelines set forth in *NYSDOT*, by law, the USCIS does not have the discretion to ignore binding precedent. *See* 8 C.F.R. § 103.3(c).

Counsel again cites the NCLBA and other government initiatives to reform and improve public education. Counsel asserts that section 203(b)(2)(B)(i) of the Act does not contain clear guidance on eligibility for the waiver, and claims that Congress subsequently filled that gap with the passage of the NCLBA. Counsel notes that Congress passed the NCLBA three years after the issuance of *NYSDOT* as a precedent decision and that "Congress has spelled out the national interest with respect to public elementary and secondary school education" through such legislation. Counsel, however, identifies no specific legislative or regulatory provisions that exempt school teachers from *NYSDOT* or reduce its impact on them.

Counsel also does not support the assertion that the NCLBA modified or superseded *NYSDOT*; that legislation did not amend section 203(b)(2) of the Act. Once again, the unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. at 534 n.2; *Matter of Laureano*, 19 I&N Dec. at 3 n.2; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. In contrast, section 5 of the Nursing Relief for Disadvantaged Areas Act of 1999, Pub. L. 106-95 (November 12, 1999), specifically amended the Immigration and Nationality Act by adding section 203(b)(2)(B)(ii) to create special waiver provisions for certain physicians. Because Congress not only can amend the Act to clarify the waiver provisions, but has in fact done so in direct response to *NYSDOT*, counsel has not shown that the NCLBA indirectly implies a similar legislative change.

Counsel further states:

> With respect to the E21 visa classification, INA § 203(b)(2)(A) provides in relevant part that: "Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the **national . . . educational interests**, . . . of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

Counsel, above, highlights the phrase "national . . . educational interests," but the very same quoted passage also includes the job offer requirement, *i.e.*, the requirement that the alien's "services . . . are sought by an employer in the United States." Counsel has, thus, directly quoted the statute that supports the director's conclusion. By the plain language of the statute that counsel quotes on appeal, an alien professional holding an advanced degree is presumptively subject to the job offer requirement, even if that alien "will substantially benefit prospectively the national . . . educational interests . . . of the United States." Neither the Immigration and Nationality Act nor the NCLBA, separately or in combination, create or imply any blanket waiver for foreign teachers.

Counsel asserts that the benefit arising from the petitioner's work is national in scope because of the "national priority goal of closing the achievement gap." The record, however, contains no evidence that the petitioner's efforts have significantly closed that gap. The national importance of "education" as a concept, or "educators" as a class, does not establish that the work of one teacher produces benefits that are national in scope. *See NYSDOT* at 217, n.3. A local-scale contribution to an overall national effort does not meet the *NYSDOT* threshold. The aggregate national effect from thousands of teachers does not give national scope to the work of each individual teacher.

Counsel continues:

> The national priority goal of closing the achievement gaps between minority and nonminority students, and between disadvantaged and more advantaged children is especially relevant in the context of and . The 2012 MSA Reading results show that out of the 24 Maryland school districts ranked near the bottom at the 'All Student' level for each MSA-covered grade level . . . .

The petitioner worked for from 2007 – 2011, and thus had been there for a number of years before the administration of the 2012 MSA tests. Counsel fails to explain how the 2012 MSA results for (which indicate low rankings relative to other Maryland school districts) establish that the petitioner has played an effective role in "closing the achievement gap."

Counsel states that the petitioner "is an effective teacher in raising student achievement in STEM" (science, technology, engineering and mathematics), but he cited no documentary evidence to support that claim. As previously discussed, the unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. at 534 n.2; *Matter of Laureano*, 19 I&N Dec. at 3 n.2; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. Regardless, there is no documentation demonstrating that the petitioner has had an impact or influence in raising student proficiency in STEM outside of

Counsel asserts that the director "erred in his appreciation of petitioner's past achievement," but counsel fails to point to specific evidence in the record showing that the petitioner's work has had a national impact or has otherwise influenced the field as a whole.

Counsel states that factors such as "the 'Privacy Act' protecting private individuals" make it "impossible" to compare the petitioner with other qualified workers and that USCIS "should have presented its own comparable worker." *NYSDOT* guidelines do not require an item-by-item comparison of an alien's credentials with those of qualified United States workers. The key provision is that the petitioner must establish a record of influence on the field as a whole. Moreover, there is no provision in the statute, regulations, or *NYSDOT* requiring the director to specifically identify another equally qualified special educator. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013).

Counsel claims: "the Immigration Service is requiring more from the beneficiary's credentials and tantamount to having exceptional ability," even though one need not qualify as an alien of exceptional ability in order to receive the waiver. As previously discussed, the requirements for exceptional ability are separate from the threshold for the national interest waiver. It remains that the petitioner's evidence does not facially establish eligibility for the national interest waiver. The director did not require the petitioner to establish exceptional ability in his field. Instead, the director observed that the petitioner's evidence does not show that the petitioner's work has had an influence beyond the school district where he has worked.

Counsel cites to several studies pointing to high turnover rates and inexperience among special education teachers. As previously discussed, a shortage of qualified workers in a given field is an issue that falls under the jurisdiction of the Department of Labor through the alien employment certification process. *NYSDOT* at 221.

Counsel again argues that the labor certification guidelines "require only a bachelor's degree," and therefore "may not meet the objective of employers to hire highly qualified teachers pursuant to No Child Left Behind." On page 12 of the appellate brief, however, counsel acknowledges that the statutory definition of a "highly qualified" teacher requires only a bachelor's degree. Counsel does not reconcile these contradictory claims.

Counsel asserts that a waiver would ultimately serve the interests of United States teachers, because if schools "fail to meet the high standard required under the No Child Left Behind (NCLB) Law," the result would be "not only . . . closure of these schools but [also] loss of work for those working in those schools." Counsel offers no specific example of this situation ever happening. As previously discussed, the unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. at 534 n.2; *Matter of Laureano*, 19 I&N Dec. at 3 n.2; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. Moreover, the record does not show that the petitioner's work has brought schools closer to meeting the NCLBA requirements.

Much of the appellate brief consists of general statements about educational reform and discussion of perceived flaws in the labor certification process. The petitioner, however, has not established that Congress intended the national interest waiver to serve as a blanket waiver for special education teachers. USCIS grants national interest waivers on a case-by-case basis, rather than establishing blanket waivers for entire fields of specialization. *Id.* at 217.

It is evident from a plain reading of the statute that engaging in a profession (such as teaching) does not presumptively exempt such professionals from the requirement of a job offer based on national interest. The petitioner has not established that his past record of achievement is at a level that would justify a waiver of the job offer requirement which, by law, normally attaches to the visa classification sought by the petitioner. The petitioner need not demonstrate notoriety on the scale of national acclaim, but the national interest waiver contemplates that his influence be national in scope. *Id.* at 217 n.3. More specifically, the petitioner "must clearly present a significant benefit to the field of endeavor."

Id. at 218. *See also id.* at 219 n.6 (the alien must have "a past history of demonstrable achievement with some degree of influence on the field as a whole."). On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende* at 128. Here, that burden has not been met.

ORDER: The appeal is dismissed.